Nos. 83-1677, 83-1678, 83-1679

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

SHERROD BROWN, SECRETARY OF STATE,
Appellant

v

JUANITA C. BRANDON, et al.,
Appellees

RICHARD F. CELESTE, GOVERNOR OF OHIO,
Appellant

v

JUANITA C. BRANDON, et al.,
Appellees

PATRICK A. FLANAGAN and ANN BUTLER,
Appellants,

v

JUANITA C. BRANDON, et al.,
Appellees

On Appeal From The United States District Court For The Southern District of Ohio

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MOTION OF APPELLEES JUANITA C. BRANDON AND ROSE MARIE HIGENBOTTAM TO AFFIRM

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MOTION OF APPELLEES JUANITA C. BRANDON AND ROSE MARIE HIGENBOTTAM TO AFFIRM

Appellees Juanita C. Brandon and Rose Marie Higenbottam, pursuant to Rule 16, of the Rules of the Supreme Court of the United States, move to affirm the order of the District Court concluding that the Ohio congressional districting plan fails to meet the "equal representation" standard of Article 1, § 2 of the Constitution of the United States. The questions raised in these appeals are so unsubstantial as not to warrant further argument.

The jurisdictional statements filed by appellants have fully set forth the questions presented, the reported decisions below, a statement of the jurisdictional grounds, and the constitutional provisions and statutes involved. Those matters need not be repeated here.

ARGUMENT

The application by the Court below of this Court's holdings in *Kirkpatrick* v. *Preisler*, 394, U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519 (1969) and *Karcher* v. *Daggett*, — U.S. —, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983), is so clearly correct as to warrant summary affirmance by this Court. Applying the standards enunciated by this Court in *Kirkpatrick* and *Karcher*, the three-judge panel correctly concluded that the population variances among the congressional districts in the Ohio districting plan could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population, and that the proponents of the plan, appellants herein, failed to meet their burden of proving that the variances were necessary to achieve some legitimate goal. In their efforts to overturn the decision of the Court below, appellants have ignored and at times misstated the Court's careful

analysis of the evidence. Appellants have even mischaracterized the very nature of the evidence itself.

The principal constitutional issue in this case is not "legislative good faith" or the absence thereof, as claimed by appellants, but equal representation for equal numbers of people. This issue has been thoroughly dealt with and explained by this Court over the years in a series of cases, beginning with *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). More recently, in *Kirkpatrick*, this Court held:

> ". . . the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality . . .
>
> * * *
>
> . . . the command of Art. 1, § 2 . . . permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 394 U.S. at 530-531, 89 S. Ct. at 1229.

Only a year ago, in *Karcher*, this Court again declared that "absolute population equality" was the "paramount objective of apportionment . . . in the case of congressional districts." — U.S. —, 103 S. Ct. at 2659. This Court then set forth the analysis by which courts should proceed to determine the constitutionality of congressional districting plans:

> "First, the court must consider whether population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plain-

> tiffs can establish that the population differences were not the result of a good faith effort to achieve equality the state must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." 103 S. Ct. at 2658.

As is evident from the opinion of the Court below, it faithfully adhered to this analysis in determining that the Ohio districting plan did not meet constitutional standards. The evidence adduced at trial clearly demonstrated that the population variances among the districts could have been reduced or eliminated, and were not the result of any good faith effort to achieve equality.[1] Appellants' claim that such evidence consisted merely of "the opinions of the disgruntled" or "solicited speculations" is totally inaccurate. For example, the Court below observed in its earlier opinion in the case, *Flanagan* v. *Gillmor*, 561 F. Supp. 36, 42 (S.D. Ohio 1982) that "less hurried final action by the Ohio General Assembly would have permitted greater mathematical precision." Indeed, as the Court noted, Edith Woodward, "a Librarian for the Ohio Legislative Service Commission who played a significant role in drafting the new district lines, candidly admitted that with more time a better effort to achieve precise mathematical equality could have been made." *Ibid.* This testimony by Mrs. Woodward was confirmed by that of James Tilling, Clerk of the Ohio Senate, both of whom

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[1] The population variances among congressional districts in this case were virtually identical to those found by this Court in *Karcher* to be impermissible. Under the New Jersey Plan invalidated in *Karcher*, each district, on average, differed from the ideal population figure by .1384%. The Ohio plan at issue in this case had an average deviation from ideal of .14%. In the New Jersey plan, the variation between the most and least populous districts was .6984%; in the Ohio plan at issue here, the maximum variation was .62%.

were directly involved in the process and neither of whom could fairly be described as "disgruntled."

The Court below further found that use of census tracts instead of the smaller census blocks in drawing district lines was a factor contributing to variances among districts. "By utilizing census blocks, a greater degree of mathematical precision was possible." *Ibid.* This conclusion was again supported by the testimony of Mrs. Woodward, who stated that by using census blocks it was possible to reduce variations among districts to something less than 3,000 people, the maximum variation in the present plan. That census blocks were available as a tool in drawing district lines is evidenced by the fact that the Ohio House used census blocks in its version of the plan, and that blocks were used in some instances in the final version approved by both the House and Senate.

Significantly, the Court below also found that variances occurred in the Ohio plan because "mathematical equality was sacrificed for the pursuit of secondary goals" (Jurisdictional Statements App. 16a or A-16). This finding was plainly supported by Mr. Tilling's testimony that districts of precise mathematical equality could have been drawn by the General Assembly if efforts had not been made to pursue such secondary interests as preservation of communities of interest and census tract boundaries. Similarly, Ohio Senate President Paul Gillmor testified that the necessity for legislative compromise may have affected efforts to achieve absolute mathematical equality among the districts.

Because the three-judge panel properly found that the variances among the districts could have been reduced or avoided and were the result of something other than a "good faith effort to achieve equality," the burden then

shifted to appellants under the second prong of the *Karcher* test to justify the variances by proving that each significant variance was necessary to achieve some legitimate goal. As the Court below noted in its opinion, this Court's decisions in *Kirkpatrick* and *Karcher* require that appellants show: (1) that a variation resulted from the legislature's attempt to carry out a legitimate state policy, (2) that the variation was necessary to effectuate the policy, and (3) that the policy was applied consistently throughout the State (J.S. App. 17a or A19).

Appellants claimed below that the variations in the plan were justified by various State policies: the creation of safe districts for Ohio's only black Representative and only woman Representative, the intention of the legislature to be politically fair, the need for political compromise, and the preservation of communities of interest. However, as the Court below correctly noted in its opinion, the record is completely devoid of any evidence that the pursuit of these "policies" caused the particular variations, that the variations were necessary to effectuate the policies, or that the policies were applied consistently throughout the State (J.S. App. 19a-23a or A21-A26). Therefore, the three-judge panel was compelled by this Court's decision in *Karcher* to find that appellants had not met their burden of justifying the variances, and that the plan was therefore unconstitutional.

Nevertheless, appellant Celeste claims in his jurisdictional statement that the Court below erred in requiring appellants to justify every variance, no matter how significant, on the basis of the same legitimate state interest. While the Court's opinion plainly indicates that appellants were not required to justify *every* variance on the basis of the same interest (J.S. App. 18a or A-20), the

issue is moot in any event because appellants clearly failed to justify *any*. Furthermore, the requirement that variances be justified on the basis of policy applied consistently throughout the State did not originate with the Court below; it was first imposed by this Court in *Kirkpatrick*, where the justifications offered for the variances in the Missouri plan were rejected because they were not:

> ". . . thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." 394 U.S. at 535, 89 S. Ct. at 1231.

The evidence clearly supports the district court's conclusions that the population variances in the Ohio plan could have been reduced or eliminated altogether by a good faith effort to achieve population equality, and that the variances were not justified on the basis of some legitimate State objective. For this reason, appellants have chosen to focus their appeal on the district court's interpretation of the phrase "good faith;" they in essence argue that where the legislative leaders have collectively claimed that they acted in good faith in preparing the districting plan and achieving population equality, the first step of the *Karcher* plan has been satisfied and the districting plan must be approved even though wholly avoidable variances among districts are present.

Such an argument totally ignores the fact that this Court's decisions have, for over fifteen years, reflected the principle that the "paramount objective of apportionment . . . in the case of Congressional districts" is "absolute population equality," not the subjective good faith claims of the legislative leaders responsible for districting plans, *Karcher*, — U.S. —, 103 S. Ct. at 2657. Indeed, in *Mahan* v. *Howell*, 410 U.S. 315, 322, 93 S. Ct. 979, 984 (1973), this Court described "population alone" as "the

sole criterion of constitutionality in congressional districting under Art. 1, § 2."

It is for this reason, as the Court below correctly stated, that "numerical considerations, i.e., mathematical equality, are of primary significance" in determining whether the first prong of the *Karcher* test has been met (J.S. App. 11a or A-12). In fact, in *Kirkpatrick*, this Court's finding that the variances in the Missouri plan were avoidable disposed of the good faith issue. As this Court then observed:

> "The New York plan of regions divided into districts of almost absolute population equality described in *Wells* v. *Rockefeller* . . . provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts." 394 U.S. at 532, 89 S. Ct. at 1229 (citations omitted).

That observation in *Kirkpatrick* was echoed by the conclusion of the Court below:

> ". . . had the legislature exercised the kind of good faith effort to achieve population equality required by the Supreme Court, it would have been able to come significantly closer to that goal than it did." (J.S. App. 15a or A-15).

Thus, the Court below did not "break new ground" by declaring that "when population variances can be reduced and those variances are not unavoidable, then there is an absence of good faith in that special sense in which *Karcher* and *Kirkpatrick* use that phrase" (J.S. App. 14a or A-15). The Court below merely restated a principle that has been followed consistently by this Court since *Kirkpatrick* was first decided. Adherence to such a principle is essential, unless the objective of population equality is to become meaningless. This is evidenced by the jurisdictional state-

ment of appellant Brown, where it is suggested that "a *bona fide* effort to achieve population equality" had been made, even though such effort resulted in population variances that could have been avoided "with greater care, time and resources." (J.S. p. 8) This is precisely the kind of argument rejected by this Court in *Kirkpatrick*, and it need not be considered by this Court again.

CONCLUSION

In concluding that the population variances among congressional districts in the Ohio plan did not meet the "equal representation" standard of Article 1, § 2 of the United States Constitution, the Court below faithfully adhered to and applied the standards set forth by this Court in both *Kirkpatrick* and *Karcher*. These appeals raise no issues warranting review by this Court, and the lower Court's decision should therefore be affirmed.

Respectfully submitted,

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